BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ROBERT L. CONLEY	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,057,570
LOVE BOX CO., LLC[1]	)	
Self-Insured Respondent	)	
	)	

ORDER

Respondent requests review of the October 20, 2011 preliminary hearing Order entered by Administrative Law Judge John D. Clark.

ISSUES

The Administrative Law Judge (ALJ) found claimant was injured out of and in the course of his employment with respondent on July 5, 2011, and that the injuries from the accident are the primary factor causing claimant's present condition. The ALJ went on to order all of claimant's medical paid, authorized Dr. Paul Stein to be claimant's treating physician, and ordered temporary total disability be paid beginning August 26, 2011, until claimant is released, after finding that claimant was not terminated for cause. The ALJ made no comment regarding claimant's alleged date of accident of May 26, 2011, or on an alleged series of traumatic injuries.

Respondent argues that the claimant failed to prove that he suffered an accident, repetitive trauma, or resulting injury arising out of and in the course of his employment, and that claimant failed to provide timely notice of the alleged injury or injuries. Therefore, respondent contends that the ALJ's Order should be reversed and claimant denied compensation, having failed to satisfy his burden of proving that he sustained a work-related accident or repetitive trauma. Respondent contends claimant is not entitled to temporary total disability benefits because his employment was terminated for cause and, if not for that, his restrictions could have been accommodated.

Claimant argues that the Order should be affirmed.

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[1] Respondent also operates in Wichita, Kansas as Pratt Industries.

The issues are:

1. Whether claimant suffered an accident, repetitive trauma, or resulting injury;
2. Whether the alleged accidents are the prevailing factor in causing claimant's injuries;
3. Whether the injuries arose out of and in the course of employment;
4. Whether timely notice was given;
5. Whether claimant is entitled to temporary total disability benefits (TTD); i.e. whether certain defenses apply, or more specifically, was claimant terminated for cause, thus eliminating his right to TTD? Does the Board take jurisdiction of this issue on appeal from a preliminary hearing order?

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed.

Claimant worked for respondent, Love Box Co., LLC, now Pratt Industries for 24 years. His job was to operate a machine which loaded 1 to 2 ton paper rolls. Claimant was to make sure that the rolls were properly on the machine. Sometimes claimant would have to push the rolls into the proper position.

Claimant testified that he first started to notice problems with his left leg, which turned out to be his sciatic nerve, in 2010. Claimant thought that he suffered an injury to his left leg on May 26, 2011. But, he later discovered that he had a bulging disc in his back. Claimant acknowledges that he suffered from prior sciatic nerve problems. However, in the past those problems usually resolved after a few days. Claimant didn't file a workers compensation claim at the time of the May 26 incident. He sought medical treatment with Rick W. Friesen, M.D.

On May 27, 2011, when claimant met with Dr. Friesen, he was asked what his job was. Claimant reported to the doctor that pushing and pulling activities were the cause of his pain. Claimant was told he needed to report his problems as work-related. Claimant continued to work for respondent and his problems got worse.

By June 17, 2011, claimant's problems had gotten worse and he went to the Galichia hospital in Wichita. Claimant was again told that his sciatic problems were due to repetitive pushing and pulling. When claimant returned to Dr. Friesen on June 20, 2011, he reported that his pain had lessened while off work, until claimant returned to work and pushed the first roll. Then his pain returned. Claimant still did not report his problems to respondent as work-related.

On June 22, 2011, claimant reported his continued pain to Rod Tormey, respondent's plant scheduler, and Bryan Moore, respondent's corrugation supervisor, both supervisors that were working the same shift that day. Claimant told them that he was going to the emergency room due to the pain down his left leg.[2]

By July 5, 2011, claimant felt he could no longer perform his work and informed Tony Hernandez, the second shift supervisor, that he needed to leave work and go to the emergency room. Claimant testified that he was only two hours into his shift when, after pushing a paper roll, he experienced pain in his lower back that was a 10 out of 10 on the pain scale. Claimant testified that Vince Miller and Carl Freeman, respondent's safety and health manager, told him he should seek medical attention and have it processed through his health insurance carrier Blue Cross.

On July 12, 2011, claimant met with Dr. David Sollo and received an epidural injection in his back at L5-S1, along with medication and physical therapy. The injection provided little improvement of his back pain.

The next day, July 13, 2011, claimant reported his problems as work-related. He reported that he injured his back on July 5, 2011 while pushing the paper rolls. Claimant filed an accident report on July 13, 2011, noting July 5, 2011 as the date of accident. He testified that initially he didn't want to press filing a workers compensation claim against respondent because he had worked for respondent for 24 years and didn't want to cause any problem. But, his pain reached the point where he didn't have a choice.[3]

Claimant underwent a second epidural injection with Dr. Sollo on August 4, 2011. This injection caused claimant to experience significant pain which was not unexpected. Claimant had earlier been prescribed Lortab for the pain, and this prescription was continued. Claimant had also earlier been prescribed Percocet which made him nauseated. This medication was discontinued. Claimant worked light duty until August 26, 2011, at which time his employment was terminated for hitting a sprinkler line with a forklift.

Claimant contends that under the new law he provided proper notice by telling two people that he had hurt his back, but that he would take care of it as he had done in the past. But when it turned out to be more than a minor flare-up, he felt he had to report the injury so that he could get the medical care and treatment he needed.

Tony Hernandez, second shift corrugator supervisor for respondent, testified that he was not notified that the claimant had suffered a work related injury. On July 5, 2011,

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[2] P.H. Trans. at 18.

[3] P.H. Trans. at 25.

he had even asked claimant if his pain was work-related. When claimant said it wasn't, he didn't inquire any more about it.

Mr. Hernandez testified that on July 5, 2011, claimant left work and went to the ER. Claimant was experiencing extreme pain and ended up being off work the rest of the week. When claimant returned to work, he filed a workers compensation claim. Mr. Hernandez found out about the claim later when he was asked by Rod Tormey to keep an eye on claimant because claimant was having problems.

Despite having to help the claimant with his work, Mr. Hernandez never had the understanding that claimant had injured his back at work. But he was aware that the claimant was having problems with his back.

Rod Tormey, has worked for respondent for 24 years, first as a corrugator manager in charge of supervising the operation and production of all three work shifts, now as a plant scheduler. He was not claimant's direct supervisor.

Mr. Tormey testified that company policy regarding workers compensation accidents requires an immediate investigation of a reported accident. Human Resources and Carl Freeman are then contacted. He testified that there are times when an employee will suffer a twinge or injure something that is not that serious and decide not to see a doctor, and keep working. And while this is not recommended, it is allowed.

Mr. Tormey testified that at no point before July 5, 2011, did claimant report a work injury or any problems with his leg or back due to his work. He did notice claimant limping once and a while, but he never asked the claimant about it.

The first that Mr. Tormey learned of claimant reporting a work injury was on July 13, 2011, when claimant returned to work after seeing a doctor on July 5. At a meeting with the claimant and the plant manager, claimant reported that he was going to take care of the situation through his medical policy.

Claimant's employment was terminated in August for his third offense in three months involving damaging company equipment. The losses exceeded $10,000.

Carl Freeman, safety and health manager for respondent, testified that company policy requires employees to immediately report any injury that occurs. Once an injury is reported, an investigation is conducted and the injured worker is provided medical treatment if necessary. Mr. Freeman testified that employees are instructed to report every injury no matter how small or slight. He testified that the company likes to have documentation of work-related events even if no action is taken.

Mr. Freeman testified that he first became aware of claimant's workers compensation claim on July 13, 2011. But, he had been informed on July 5 that claimant

left work early to seek medical attention. He was told at that time that the problems were not work-related. On July 13, 2011, after claimant reported the work-related injury, Mr. Freeman gathered as much information as he could about how claimant allegedly hurt his back on July 5. An incident report was filed in order to start the process. Claimant was accommodated with light duty when he returned to work. This was intended to avoid further injury.

Claimant admitted having the same back problems four years ago. Claimant was working for respondent at the time and failed to report the problems at that time.

Bryan Moore, a corrugator supervisor, has worked for respondent for 14 years. He testified that a corrugator is someone who takes rolls of paper and runs them through a machine that makes a flat sheet of corrugated board. Mr. Moore testified that he supervised the claimant when he worked third shift.

Mr. Moore testified that claimant never told him that he suffered an injury at work. Mr. Moore testified that on July 21, 2011, he sent the claimant home early because he was looking bad and was hunched over. Rather than provide claimant with help performing his work it was better to have him take a vacation day. It was after July 21 that Mr. Moore became aware of claimant's back problems and that claimant related them to his work for respondent.

Mr. Moore was claimant's supervisor at the time of the termination. At that time, on August 25, 2011, claimant was driving a fork lift and struck a water line. The damage estimate exceeded $8,000.00 for that one incident. This was claimant's third damage offense in three months.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[4]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[5]

> If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay

[4] L. 2011, Ch. 55, sec. 1, 5.

[5] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

> compensation to the employee in accordance with and subject to the provisions of the workers compensation act.[6]

Claimant filed a K-WC E-1 Application for Hearing on September 12, 2011, alleging a date of accident on July 5, 2011. At the preliminary hearing on October 11, 2011, claimant amended his date of accident to May 26, 2011 and July 5, 2011. During his testimony, claimant discussed an ongoing series of microtraumas suffered while he worked for respondent. The ALJ found claimant had suffered a specific trauma on July 5, 2011, with no mention of the alleged May date of accident or a series of microtraumas. Respondent, in it's brief to the Board, discusses both the May and July dates of accident. Claimant discusses both dates of accident and the fact that claimant daily moved rolls of paper, pushing with his left leg. Accident and repetitive accident are defined separately under the 2011 version of K.S.A. 44-508.

The recently enacted version of K.S.A. 44-508 states in part:

> (d) ''Accident'' means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. ''Accident'' shall in no case be construed to include repetitive trauma in any form.
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> (e) ''Repetitive trauma'' refers to cases where an injury occurs as a result of repetitive use, cumulative traumas or microtraumas. The repetitive nature of the injury must be demonstrated by diagnostic or clinical tests. The repetitive trauma must be the prevailing factor in causing the injury. ''Repetitive trauma'' shall in no case be construed to include occupational disease, as defined in K.S.A. 44-5a01, and amendments thereto.
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> In the case of injury by repetitive trauma, the date of injury shall be the earliest of:
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> (1) The date the employee, while employed for the employer against whom benefits are sought, is taken off work by a physician due to the diagnosed repetitive trauma;
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> (2) the date the employee, while employed for the employer against whom benefits are sought, is placed on modified or restricted duty by a physician due to the diagnosed repetitive trauma;
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> (3) the date the employee, while employed for the employer against whom benefits are sought, is advised by a physician that the condition is work-related; or
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> (4) the last day worked, if the employee no longer works for the employer against whom benefits are sought.
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> In no case shall the date of accident be later than the last date worked.

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[6] L. 2011, Ch. 55, sec. 1.

(f)(1) ‘‘Personal injury" and ‘‘injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto, Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

(A) An injury by repetitive trauma shall be deemed to arise out of employment only if:

(I) The employment exposed the worker to an increased risk or hazard which the worker would not have been exposed in normal non-employment life;

(ii) the increased risk or hazard to which the employment exposed the worker is the prevailing factor in causing the repetitive trauma; and

(iii) the repetitive trauma is the prevailing factor in causing both the medical condition and resulting disability or impairment.

(B) An injury by accident shall be deemed to arise out of employment only if:

(I) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

(3) (A) The words ‘‘arising out of and in the course of employment’’ as used in the workers compensation act shall not be construed to include:

(I) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;

(ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;

(iii) accident or injury which arose out of a risk personal to the worker; or

(iv) accident or injury which arose either directly or indirectly from idiopathic causes.

. . . .

(g) ‘‘Prevailing’’ as it relates to the term ‘‘factor’’ means the primary factor, in relation to any other factor. In determining what constitutes the ‘‘prevailing factor’’ in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

(h) ‘‘Burden of proof’’ means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party’s position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.[7]

While claimant testifies to repetitious activities at work, there is no medical testimony supporting a finding that claimant was injured by repetitive trauma while working for

[7] L. 2011, Ch. 55, sec. 5.

respondent. Additionally, claimant does not testify to specific, repetitive injuries while working for respondent. Claimant has not satisfied his burden of proving that he suffered repetitive traumas while working for respondent.

Claimant alleges two separate traumatic events while working for respondent, on May 26, 2011 and July 5, 2011. The ALJ failed to mention the alleged May accident in his Order. Claimant testified that he told Mr. Tormey and Mr. Moore of his May 26, 2011, left leg problems, an allegation they both dispute. Additionally, the medical report of Dr. Friesen fails to identify a specific traumatic event at work, related to that claimed date of accident. Claimant described having the same pain approximately one month before. When claimant described his job to the doctor he was advised to report the injury as work-related. This record supports a finding that claimant did suffer personal injury by accident on May 26, 2011, while working for respondent. Claimant's accident was the prevailing factor in causing the current injury to his low back.

The recently enacted version of K.S.A. 44-520(a)(1)(A)(B) states in part:

> (a) (1) Proceedings for compensation under the workers compensation act shall not be maintainable unless notice of injury by accident or repetitive trauma is given to the employer by the earliest of the following dates:
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> (A) 30 calendar days from the date of accident or the date of injury by repetitive trauma;
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> (B) if the employee is working for the employer against whom benefits are being sought and such employee seeks medical treatment for any injury by accident or repetitive trauma, 20 calendar days from the date such medical treatment is sought;[8]

Claimant claims he provided notice to several of respondent's supervisors at the time he initially sought treatment for his left leg pain. This testimony is refuted by every respondent witness. Additionally, claimant paid for the initial medical treatment through his personal health insurance. The first definite notice provided to respondent occurred on July 13, 2011. That is more than the allowed time for providing timely notice under the new version of K.S.A. 44-520. Claimant has failed to prove that he provided timely notice of his accident for the May 26, 2011 injury.

The ALJ found that claimant suffered personal injury by accident on July 5, 2011, which arose out of and in the course of his employment with respondent. Claimant testified to having to push a 1-2 ton roll of paper, resulting in an immediate onset of pain in his back. Additionally, claimant left work after only about two hours on that date, seeking medical treatment for his pain. When claimant returned to work on July 13, 2011, he advised his supervisors of the pain, the work injury and its relation to his job. An accident report was immediately created. Claimant was also placed on light duty. Claimant has

[8] L. 2011, Ch. 55, sec. 16.

satisfied his burden of proving that he suffered personal injury by accident on July 5, 2011, which arose out of and in the course of his employment with respondent, with the accident being the prevailing factor causing the injury. Additionally, claimant has also satisfied the notice requirements of the new version of K.S.A. 44-520.

K.S.A. 44-534a grants the administrative law judge the authority to determine a claimant's request for temporary total disability and ongoing medical treatment at a preliminary hearing. The Board's review of preliminary hearing orders is limited to specific issues as set forth in the statute.

Not every alleged error in law or fact is reviewable from a preliminary hearing order. The Board's jurisdiction to review preliminary hearing orders is generally limited to issues where it is alleged the administrative law judge exceeded his or her jurisdiction and the following issues which are deemed jurisdictional:

1. Did the worker sustain an accidental injury?

2. Did the injury arise out of and in the course of employment?

3. Did the worker provide timely notice and written claim of the accidental injury?

4. Is there any defense that goes to the compensability of the claim?[9]

The recently enacted K.S.A.44-510c(b)(2)(C) states:

> (C) If the employee has been terminated for cause or voluntarily resigns following a compensable injury, the employer shall not be liable for temporary total disability benefits if the employer could have accommodated the temporary restrictions imposed by the authorized treating physician but for the employee's separation from employment.[10]

Respondent contends that claimant is not entitled to TTD as he was terminated for cause on August 25, 2011. However, the certain defense rule requires that a finding of non-compensability be the result. The "certain defense" issue is subject to review only if the defenses dispute the compensability of the injury.[11] Here, the certain defense would not result in a denial of compensability, but rather only a denial of TTD. A dispute over

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[9] K.S.A. 44-534a(a)(2).

[10] L. 2011, Ch. 55, sec. 7.

[11] *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, at 675, 994 P.2d 641 (1999).

TTD is not an issue over which the Board takes jurisdiction on appeal from a preliminary hearing. Therefore, respondent's appeal of that issue is dismissed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[12] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

Claimant has satisfied his burden of proving that he suffered personal injury by accident on July 5, 2011, which arose out of and in the course of his employment with respondent. Claimant provided timely notice of that accident. Respondent's appeal of the award of TTD is dismissed as being non-jurisdictional on appeal from a preliminary hearing order.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge John D. Clark dated October 20, 2011, is affirmed. Respondent's appeal of the award of TTD is dismissed as being non-jurisdictional on appeal from a preliminary hearing order.

IT IS SO ORDERED.

Dated this _____ day of January, 2012.

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HONORABLE GARY M. KORTE
BOARD MEMBER

c: James B. Zongker, Attorney for Claimant
William L. Townsley, III, Attorney for Self-Insured Respondent
John D. Clark, Administrative Law Judge

[12] K.S.A. 44-534a.